

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-177
Issued: November 1977

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May attorney B, who is A's partner, represent X and Y in a criminal proceeding initiated by their bookkeeper where attorney A will be called to testify concerning the legal advice and legal actions which he took on behalf of X and Y, considering the provisions of DR 5-101(B)(1), (2), (3), or (4)? The judge trying the case has already indicated before the instant issue was raised that attorney A's testimony would constitute an absolute defense to the criminal charges. There will be no dispute as to the legal advice rendered by attorney A to X and Y.

Answer: No.

References: EC 5-9, 5-10; DR 5-101, 5-102

OPINION

The facts set forth in the question presented indicate that attorney A will be called as witness on behalf of his clients in connection with an issue of great importance to the case in that his testimony will constitute a complete defense to the charges against them. The Committee is of the opinion that the provisions of DR 5-101(B) and 5-102(A) apply and that the anticipated testimony of attorney A will not fall under any of the exceptions enumerated in DR 5-101(B). Under DR 5-102(A) the prohibition against representation of the client would extend to attorney B who is A's partner.

In reaching this conclusion, we have considered the exceptions set forth in DR 5-101(B). On the basis of the facts outlined, we are unable to assume that the testimony of attorney A will relate solely to an uncontested matter. The fact that it will constitute a complete defense tends to indicate that it might well be contested and also that it will not relate solely to a matter of mere formality. The offered testimony will not relate solely to the nature and value of the legal services rendered and there is no indication that the clients will suffer any substantial hardship if they are represented by any attorney other than B or his partner A.

Unless the situation falls under one of the exceptions, we believe that the potential problems that may be created for X and Y and for opposing counsel require that attorney B decline this employment if his partner A is to testify.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.